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No. 84-187

In the Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL W. CHAPLAIN, JR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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8 pp

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TABLE OF AUTHORITIES

Page

Cases:

Berger v. *Commissioner*, 404 F.2d 668 3

Bob Jones University v. *Simon*, 416 U.S. 725 5

Bull v. *United States*, 295 U.S. 247 4

Cohen v. *United States*, 297 F.2d 760 5

Commissioner v. *Shapiro*, 424 U.S. 614 4

Deutsch v. *Commissioner*, 599 F.2d 44 3

DeWelles v. *United States*, 378 F.2d 37 3

Fuentes v. *Shevin*, 407 U.S. 67 4-5

Jewel Shop v. *Pitts*, 218 F.2d 692 5

Johnson v. *Commissioner*, 611 F.2d 1015 3

Luhring v. *Glotzbach*, 304 F.2d 556 3

Phillips v. *Commissioner*, 283 U.S. 589 4

Rappaport v. *United States*, 538 F.2d 298 3

United States v. *Ahrens*, 530 F.2d 781 3

United States v. *Zolla*, 734 F.2d 808 3

Constitution and statute:

U.S. Const. Amend. V (Due Process Clause) 4

Internal Revenue Code of 1954 (26 U.S.C.):

§§ 6211-6213 4
§ 6212(a) 3
§ 6212(b)(1) 2, 3, 4
§ 6213(a) 1, 2, 3

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Petitioners challenge the court of appeals' decision affirming the Tax Court's dismissal for lack of jurisdiction of their petitions for redetermination of income tax deficiencies, a dismissal predicated on the fact that petitioners failed to file their Tax Court petitions within the time prescribed by Section 6213(a) of the Internal Revenue Code.

1. On April 10, 1980, the Commissioner sent to petitioners by certified mail notices of deficiency regarding certain income tax liabilities (Pet. App. A4). The notices were mailed to petitioners at the addresses of two of their family-controlled corporations (*id.* at A4-A6, A8-A9). While another notice, similarly addressed and mailed at the same time to petitioners' daughter, was timely received by her, the notices addressed to petitioners were returned to the IRS by the Postal Service marked "unclaimed" (*id.* at A11, A29). After petitioners were billed by the Commissioner for the

asserted deficiencies, they filed, on October 31, 1980, and November 3, 1980, Tax Court petitions seeking redetermination of the proposed assessments (*id.* at A4-A11).

The Commissioner moved to dismiss the petitions for lack of jurisdiction. He cited the requirement, set forth in Section 6213(a) of the Code,[1] that a Tax Court petition must be filed "[w]ithin 90 days * * * after the notice of deficiency * * * is mailed," whereas petitioners had not filed their petitions until six months after the notices were mailed here. The Tax Court found that the IRS had properly mailed the notices to petitioners' "last known address" (I.R.C. § 6212(b)(1)), yet also found, upon initially considering the case, that the Postal Service had failed to attempt delivery of the notices in question (Pet. App. A8-A10). Given that latter circumstance, the court reasoned, "realism and justice require[d] that the 90-day period provided in section 6213(a) should be measured, not (as in the usual case) from April 10, 1980, when the notices were mailed, but from the time in late October or early November of that year, when petitioners * * * learned for the first time of the existence of the asserted deficiencies" (Pet. App. A13-A14). On that theory, petitioners' Tax Court petitions would have been timely.

The Commissioner moved for reconsideration. The Tax Court held a further evidentiary hearing and found that the Postal Service had in fact attempted delivery of the deficiency notices (Pet. App. A22-A34). The court thus concluded that the 90-day period ran from the April 10 mailing date, vacated its original order, and dismissed the petitions for lack of jurisdiction (*id.* at A33-A35). The court of appeals affirmed in an unpublished per curiam opinion, holding (*id.* at A41) that the Tax Court's factual findings

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

were not "clearly erroneous" and that, "because the mailing address was correct and the postal service utilized the standard procedures for delivering the notices, the mailing of the notices by the Internal Revenue Service [was] all that was required" by the relevant Code provisions.

2. The decision below is correct. Section 6212(a) provides that, if the Commissioner determines a deficiency in income tax, "he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail." Section 6212(b)(1) provides that such notice, "if mailed to the taxpayer at his last known address, shall be sufficient for purposes of * * * this chapter." Section 6213(a) in turn provides that a petition for redetermination of the deficiency must be filed in the Tax Court "[w]ithin 90 days * * * after the notice of deficiency authorized in section 6212 is *mailed*" (emphasis added). See *DeWelles* v. *United States*, 378 F.2d 37, 39 (9th Cir. 1967). Failure to meet the 90-day deadline creates an absolute bar to the Tax Court's jurisdiction. *Johnson* v. *Commissioner*, 611 F.2d 1015, 1018 (5th Cir. 1980); *Deutsch* v. *Commissioner*, 599 F.2d 44, 45 (2d Cir. 1979). Thus, so long as the IRS timely mails a deficiency notice to the taxpayer's "last known address," the Commissioner has fulfilled the statutory requirements and it is immaterial whether or not the taxpayer actually receives the document. See, *e.g.*, *United States* v. *Zolla*, 724 F.2d 808, 810 (9th Cir. 1984); *United States* v. *Ahrens*, 530 F.2d 781 (8th Cir. 1976); *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978); *Berger* v. *Commissioner*, 404 F.2d 668, 672 (3d Cir. 1968); *Luhring* v. *Glotzbach*, 304 F.2d 556, 558 (4th Cir. 1962). Both courts below found that the deficiency notices at issue here were properly mailed to petitioners at their last known addresses (Pet. App. A9, A40), and, because petitioners failed to file in the Tax Court

within 90 days of the mailing date, that court was plainly without jurisdiction.[2]

Petitioners, while appearing to concede that their Tax Court petitions were untimely under Sections 6211 to 6213, contend (Pet. 10-27) that the procedures specified by those Sections, as applied to the facts of this case, are unconstitutional under the Due Process Clause. This contention is apparently based on the theory that the challenged Code provisions fail to ensure the availability of a prepayment forum to contest an asserted tax liability where (as here) a notice of deficiency has been properly mailed but not received.

This contention is frivolous. Due process requires only that a taxpayer have an opportunity to contest his tax liability at a meaningful time and in a meaningful manner. *Commissioner* v. *Shapiro*, 424 U.S. 614, 631-632 (1976); *Bull* v. *United States*, 295 U.S. 247 (1935); *Phillips* v. *Commissioner*, 283 U.S. 589 (1931). Wholly apart from the fact that petitioners themselves would appear to bear full responsibility for their failure to receive the deficiency notices, it is settled that, with respect to federal taxes, the opportunity to maintain a suit for refund, after payment of the tax, fully satisfies the requirements of the Due Process Clause. *Bull* v. *United States, supra*; *Phillips* v. *Commissioner, supra*. See also *Fuentes* v. *Shevin*, 407 U.S. 67, 92

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[2]Since Section 6212(b)(1) provides that a notice of deficiency shall be sufficient "if mailed to the taxpayer at his last known address," it is irrelevant in our view whether or not the Postal Service actually attempted to deliver the notices. At all events, the Tax Court ultimately found as a fact that the Postal Service had attempted delivery (Pet. App. A22-A34) and the court of appeals sustained that finding (*id.* at A40-A41).

n.24 (1972) (reaffirming that a pre-collection remedy is not required in the case of federal taxes). The government has no obligation to guarantee the availability of a prepayment judicial forum in which a taxpayer may litigate the correctness of the Commissioner's deficiency determinations. See *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-747 (1974); *Cohen* v. *United States*, 297 F.2d 760, 772 (9th Cir. 1962); *Jewel Shop* v. *Pitts*, 218 F.2d 692 (4th Cir. 1955).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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